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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 24

IN THE MATTER OF FLORIDA EAST COAST RAILWAY COMPANY,

Debtor,

ST. JOE PAPER COMPANY, a corporation, and JESSIE BALL DUPONT, ELBERT DENT, EDWARD BALL and THE FLORIDA NATIONAL BANK OF JACKSONVILLE, as Testamentary Trustees of the Trust Estate created by the Last Will and Testament of Alfred I. duPont, RAILWAY LABOR EXECUTIVES' ASSOCIATION, SEABOARD AIR LINE RAILROAD COMPANY, SOUTHERN RAILWAY SYSTEM and F. K. CONN,

Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF ST. JOE PAPER COMPANY, A CORPORATION, AND THE TRUSTEES UNDER THE WILL OF ALFRED I. duPONT, AND F. K. CONN, *et al.*

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Counsel for Railway Labor Executives' Association will also file a separate brief.

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ST. JOE PAPER COMPANY, *et al.*,

Petitioners,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Respondent.

BRIEF FOR PETITIONERS ST JOE PAPER COMPANY, THE TRUSTEES UNDER THE WILL OF ALFRED I. duPONT AND F. K. CONN, *et al.*

Opinions Below.

The opinion of the District Court by Judge Strum (R. Vol. I, p. 127) is reported in 103 F. Supp. 825.

The opinion of the Court of Appeals (R. Vol. II, p. 717) is reported in 201 F. 2d 325.

The opinion of Judge Sibley, sitting as a District Judge on a plan of reorganization immediately preceding the one here involved, is reported in 81 F. Supp. 926. The opinion of the Court of Appeals on the last preceding merger plan is reported in 179 F. 2d 538.

Jurisdiction.

The judgment of the Court of Appeals was entered January 19, 1953. The petition for certiorari was filed March 21, 1953, and granted May 4, 1953. Jurisdiction to issue the writ rests on Title 28, U. S. C., § 1254.

Question Presented.

The sole question presented is whether the amendments made in 1935 to Section 77 of the Bankruptcy Act give the Interstate Commerce Commission authority to approve and certify to the United States District Court a plan for reorganization of a bankrupt railroad which provides for a merger of the bankrupt and another railroad corporation, by a transfer of the property of the bankrupt railroad to another railroad, in exchange for securities of the transferee railroad, when the plan for merger has not been initiated or consented to by the bankrupt road but is vigorously opposed by the bondholders who are the equitable owners of the bankrupt.

The petitioners' contention, which was stated as question 1 in our petition for certiorari (No. 670, Oct. Term, 1952), is that Congress has for many years in

the Interstate Commerce Act deliberately and consistently withheld from the Interstate Commerce Commission authority to order or compel consolidation of railroads, and that it limited the Commission's authority to approving mergers initiated and agreed to by the carriers involved, and that the express provisions of Section 77 of the Bankruptcy Act as enacted in 1933 and as amended in 1935 preserved such limitations, and withheld from the Commission any authority to initiate, approve or certify to the District Courts any plan of reorganization under Section 77 of the Bankruptcy Act requiring a merger not agreed to by the carriers involved.

In our petition for certiorari, and in several other petitions for certiorari by other parties, additional grounds for disapproval of the Commission's present plan for reorganization were also urged, but the order granting the writ provides that "The petitions for writs of certiorari are granted limited to question 1 presented by the petition for writ of certiorari in No. 670." Although the additional questions thus eliminated were substantial, we are quite content with their elimination because our contention as to lack of authority in the Commission seems to us so clearly well founded that this Court would never reach those additional points.

The Statutes.

Subdivision (b) of Section 77 of the Act of 1933, amending the Bankruptcy Act so as to apply to reorganization of railroads, was as follows:

> "(b) A plan of reorganization within the meaning of this section * * * (3) shall provide

adequate means for the execution of the plan, which may, *so far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act, as amended*, include the transfer or conveyance of all or any part of the property of the debtor to another corporation or to other corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation. * * *." (Italics supplied.)

The part in italics has for convenience been called the "consistency clause".

A similar clause was placed in subdivision (e) of the 1933 Act, which reads as follows:

"Upon acceptance of the plan in accordance with the provisions of this subdivision (e), the Commission may without further proceedings grant authority for * * * transfer of any property or consolidation or merger of properties to the extent contemplated by the plan *consistent with the purposes of the Interstate Commerce Act as amended*." (Italics supplied.)

It will be noted that the clause in (b) required consistency with the "*provisions*" of the Interstate Commerce Act, while the clause in (e) required consistency with the "*purposes*" of the Interstate Commerce Act. In 1935 when the bill for amendments was under consideration, the clauses in (b) and (e) were consolidated and transposed from (b) and (e) to (f), where it reads as follows:

"Upon confirmation of a plan the Commission

shall, without further proceedings grant authority for the * * * transfer of any property, sale, consolidation or merger of the debtor's property * * * to the extent contemplated by the plan *and not inconsistent with the provisions and purposes of the Interstate Commerce Act as now or hereafter amended,"*

thus using both the words "provisions" and "purposes" with the obvious intention of making the consistency clause being transposed to (f) as broad as it had been in the 1933 Act.

Sections 1 and 5 were part of the Interstate Commerce Act regulating unifications, mergers and acquisitions of control of railroads. Subdivision (2) of Section 5 is as follows:

"(2) *Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this section—

(1) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise;

or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

* * * *

(b) Whenever a transaction is proposed under subparagraph (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *."

In 1919 and 1920 when considering amendments to the Interstate Commerce Act, the Senate passed a bill

creating a Board of Transportation, one of whose functions was to prepare a plan for a consolidation of all the railroads in the country into twenty to thirty-five systems and to compel the railroads to so consolidate. The House rejected the proposal for compulsory consolidation. The House committee reported a bill which permitted voluntary consolidation by carriers, if approved by the Commission. The House report (No. 456, Nov. 10, 1919, pp. 6-7) said:

> "The pending bill favors permissive consolidation subject to approval by the Interstate Commerce Commission. * * * In our opinion the interests of the public will be better served where the consolidations are voluntarily entered into, upon approval by the Interstate Commerce Commission."

The bill was passed by the House in the form proposed by its committee, and in conference, "the Senate receded from the provision for compulsory consolidation" (Conference Report on H. R. 10453, 66th Congress, pp. 63-64).

That was the origin of the present provisions of the Interstate Commerce Act, which have been retained ever since. See, Transportation Act 1920, 4 Stat. 456, 481.

The statute under which Judge Strum dismissed the bankruptcy proceeding and reinstated the equity receivership and foreclosure suit is subdivision (g) of § 205 Title 11 U. S. Code, which is as follows:

> "(g) *Dismissal of proceedings because of undue delay in reorganization.*
>
> If in the light of all the existing circumstances there is undue delay in a reasonably expeditious

reorganization of the debtor, the judge, *in his discretion*, shall, on motion of any party in interest or on his own motion, after hearing and after consideration of the recommendation of the Commission, dismiss the proceedings. Upon the filing of such an order of dismissal, all right, title, or interest of the trustee or trustees shall vest by operation of law in the debtor unless otherwise provided by such order." (Italics supplied.)

Specification of Errors.

1. The Court of Appeals erred in holding that the Interstate Commerce Commission had authority to approve and certify to the District Court a plan of reorganization, which provides for merger of the Florida East Coast Railroad with the Atlantic Coast Line, which plan was not initiated by or consented to by the Florida East Coast Railway Company.

2. The Court of Appeals erred in holding that the so-called "consistency clause" enacted in 1933 and retained in 1935 did not have the effect of retaining the existing provisions of the Interstate Commerce Act which denied to the Commission authority to compel a railroad merger without the consent of the carriers involved.

Statement.

The main lines of the Florida East Coast Railway extend from Jacksonville to a point a little south of Miami. At Jacksonville it interchanges freight and passengers with the Southern Railway, the Seaboard

and the Atlantic Coast Line. It has always been completely independent. None of those other three lines has owned any of its securities. It operated under an equity receivership in the United States District Court for the Southern District of Florida from August 31, 1931, until January 25, 1941, when a reorganization proceeding was instituted under Section 77 of the Bankruptcy Act. Several plans of reorganization have been proposed by the Interstate Commerce Commission. The first and third were rejected by the District Court. The second was in effect withdrawn by the Commission.

In its earlier action the Interstate Commerce Commission proposed plans for "internal" reorganization. In November 1944 a suggestion was first made to the Commission to certify a plan which would involve control of the Florida East Coast Railway by Atlantic Coast Line. This proposal was unanimously rejected by the Commission (261 I. C. C. 151).

The case of the *Soo Line Reorganization*, 252 I. C. C. 525, was cited to the Commission as authority for the claim that the Commission had there exercised authority to compel a merger between the Soo Line and the Canadian Pacific by giving the Canadian Pacific Railroad an option to acquire stock in the Soo Line. Of that the Commission said:

> "In that case, however, the Canadian Pacific had controlled that debtor for a great number of years, was itself a large creditor of the debtor and there was general agreement among the creditors upon the necessity for the sale and the price to be paid for the stock. The parties to the proceeding in that case were generally agreed

that a continued control by the Canadian Pacific of the debtor was vital to its existence and we so found.

No similar situation is presented in the present procedure. The sale of stock would be required in the face of aggressive opposition from the holder of a majority in principal amount of the first and refunding bonds, which also states in its brief that, in the event the plan is approved, it will vote to reject it" (261 I. C. C. 192).

This indicated that at that time (January 1945) the Interstate Commerce Commission was not persuaded that it had power to force a merger, without the consent of the equitable owners of the Florida East Coast.

The Coast Line has never had any control over the Florida East Coast or any ownership of its securities. It intervened with the consent of the Interstate Commerce Commission and has since purchased for $5,000, $1,900,000 of unsecured claims against the Florida East Coast, the holders of which have no interest in the mortgaged property though they may have an interest in some free assets. See Judge Strum's opinion (R. Vol. I, p. 133, and footnote). There is a first mortgage on the Florida East Coast, which is not in default, originally for $12,000,000 now reduced to $8,189,000, by purchases by the trustees in bankruptcy for the account of the first and refunding bondholders, and the Florida East Coast has in its recent operations amassed more than enough money to pay the first mortgage in full. There is another mortgage to secure an issue of the 5% first and refunding bonds, the principal of which is $45,000,000 and the accumulated and defaulted interest, now in

excess of $35,000,000. The Commission found that the stock is worthless (267 I. C. C. 383) and that the holders of these 5% bonds are the equitable owners of the mortgaged property (282 I. C. C. 165, 186).

A plan by the Commission, overruling the report of its Examiner, adopted by its vote of six to five, which plan included a merger with the Atlantic Coast Line, was considered in 1949 by Circuit Judge Sibley, sitting in the District Court (81 F. Supp. 926). He considered whether the Interstate Commerce Commission had statutory power to make and certify a plan involving a forced merger, and also whether the plan was fair and equitable. On the question of power he said:

> "I do not think Congress intended to force a merger undesired by the majority in amount of the affected parties by permitting a merger to be part of a plan. This conclusion makes it unnecessary to determine whether the court's power in bankruptcy could be extended to force a merger consistently with the Fifth Amendment. It also ends this plan. But I am assured in argument that the decision if made either way will be appealed, so it will be useful to decide the merits of the plan, if it is hereafter held that a forced merger is lawful" (p. 932, 81 F. Supp.).

He then went on to hold the plan not fair and equitable, and that "the objectors are reasonably justified in objecting and not mere obstructors", as only "$572,400 of the first and refunding bonds out of $45,000,000 say they will probably accept". He then discussed the facts at length and disapproved the plan, and referred the case back to the Commission.

From Judge Sibley's decision an appeal was taken by the Atlantic Coast Line and others to the Court of Appeals of the Fifth Circuit (179 F. 2d 538). The Court of Appeals, in an opinion by Judge Hutcheson, affirmed Judge Sibley's judgment holding the plan unfair and unreasonable. Judge Hutcheson said:

> "The case we have here is that of one railroad company coveting, and pressing to possess, a competing debtor railroad company, against the wishes of 98 percent of the equitable owners of the debtor and over their violent objections, that consummation of the plan will result in depriving them of their property without just compensation. In pressing these objections, some of the bondholders contend that an internal reorganization would better protect their interests, while all of them insist that questions of internal reorganization, as opposed to a forced merger, aside, the amount the covetous one agrees to pay for the forced expropriation is neither fair nor equitable" (p. 542, 179 F. 2d).

Judge Hutcheson also said "the opposition to a plan of all those interested in the debtor would normally make the plan *prima facie* suspect" (p. 544).

On the question of power of the Commission to certify a plan requiring a merger, Judge Hutcheson said:

> "We are in no doubt, however, that a plan providing for what the trial judge broadly called a 'forced merger', that is, a merger over the objection of the debtor and all its creditors, might be lawfully certified to the court and lawfully approved and confirmed by it."

In remanding the case to the District Court, the court below said a new plan might provide for "a merger with, or sale to, the Coast Line either with or without the approval of the security holders" (179 F. 2d 544).

Judge Russell concurred in affirming the judgment of Judge Sibley, but said he was in "complete accord" with the conclusions expressed in Judge Sibley's opinion, and could not accept contrary views expressed by Judge Hutcheson. In this way he concurred in Judge Sibley's view that Congress had not given the Commission power to submit and certify a plan to force a merger.

Judge Holmes dissented and voted to reverse Judge Sibley.

This Court denied a petition for certiorari by the Atlantic Coast Line April 3, 1950. *Atlantic Coast Line* v. *St. Joe Paper Co.*, 339 U. S. 929. The questions of power raised by the present petition were not raised by that petition and could not have been raised by the present petitioners at that stage since they had prevailed in the court below. Later, the Interstate Commerce Commission, with three dissents, approved another plan, the one now before this Court, providing for the forced transfer of the property of the Florida East Coast to the Atlantic Coast Line.

That plan came before Circuit Judge Strum, sitting in the District Court. The question of statutory power he did not deal with, as he considered himself bound by the view of Judges Hutcheson and Holmes on that point. He disapproved the plan as unfair and inequitable. His findings are fully set forth in his opinion (R. Vol. I, p. 127). He also exercised his

discretionary power to dismiss the bankruptcy proceeding under Section 77 and to reinstate the equity receivership and action for foreclosure.

SUMMARY OF ARGUMENT.

I.

In 1919 and 1920 the Congress was faced with the question whether it would give the Interstate Commerce Commission authority to compel carriers by railroad to merge. The Senate first took the position the authority should be given. The House took a contrary view and passed an Act providing that mergers could be made *only* on the initiative and with the consent of the carriers involved, but subject to the approval of the Commission. When the bills went to conference, the House prevailed and the Senate withdrew its proposal for compulsory mergers, and the bill finally agreed to, then and ever since contains the provisions now found in Section 5 of the Interstate Commerce Act, 49 U. S. C. § 5.

In 1933 when Section 77 of the Bankruptcy Act was enacted to provide for reorganization of railroads, the original draft of the bill had some clauses about transferring the property of the bankrupt carrier to other railroad corporations, and for the express purpose of preserving the long standing requirements of the Interstate Commerce Act that mergers must have the consent of the carriers involved, a so-called "consistency" clause was inserted in subdivisions (b) and (e) of Section 77 requiring that any plan proposed by the Commission must conform to the provisions and purposes of Chapter 1 of Title 49 of the Interstate Commerce Act.

In 1935 when amendments to Section 77 were made, the consistency clauses of the 1933 Act (two of them) were consolidated and transposed to subdivision (f), with the obvious purpose of continuing in effect the law which withheld from the Commission power to force mergers without the consent of the carriers.

II.

The legislative history of these statutes shows that repeatedly members of Congress, in answer to their questions, were told by those in charge of the legislation as well as by representatives of the Commission, that the proposed amendments made no change in the law as to the powers of the Commission about mergers; that it did not enlarge them, and in any reorganization under Section 77 the provision of the Interstate Commerce Act requiring mergers to be brought about on the initiative and with the consent of the carriers would still be operative.

III.

The so-called "cram-down" provisions of the 1935 amendments were designed to make it impossible for recalcitrant creditors to block a good plan unreasonably in order to obtain preferential treatment. This cram-down power is for the use of the court, not the Commission. Before the cram-down provision is operative the Commission must have certified to the District Court a plan conforming to the requirements of the law, and a plan involving a merger not consented to by the carriers is not such a plan.

The suggestion of the Commission that the plan for merger is not objected to by the Florida East Coast Railway, because its stockholders have not appeared and rejected it, is without substance as the stock is worthless and its holders would not be heard either to consent or object.

IV.

The dismissal of the proceedings under Section 77 should be sustained.

The statutes give the District Court broad discretion (pp. 7-8, *supra*). Certainly that discretion has not been abused.

ARGUMENT.

I.

The so-called consistency clause in Section 77 of the Bankruptcy Act enacted in 1933, retained in 1935, withheld from the Interstate Commerce Commission power, without the carriers' consent, to consolidate or merge railroads by incorporating provisions for that purpose in a reorganization plan certified to the District Court.

The Act of 1933 provided that any certified plan must conform with the provisions and purposes of Sections 1 and 5 of the Interstate Commerce Act. Those sections dealt with unifications, mergers and acquisitions of control of railroads. Under it, mergers, acquisitions or control could only be effected *on the initiative and at the request of the carriers*

involved with the approval of the Interstate Commerce Commission.

Were it not for the "consistency clause" the 1933 Act might have been susceptible to the interpretation that mergers could be effected under the Bankruptcy Act without consent of the carriers. But in foreclosures and equity receiverships it had been a common practice for holders of securities of the debtor railroad to organize entirely new railroad corporations to bid at a foreclosure sale, at which the securities of the debtor could be used to pay the bid price, and it is reasonable to think that the provision in Section 77 as first drafted about transfers of debtor property to other corporations was merely intended to preserve that device for use in reorganization, and the "consistency clause" was intended to limit subparagraph (b) by making it clear that a plan for merger had to be initiated and consented to by the carriers involved, as required by provisions of the Interstate Commerce Act in force since 1920.

Without the consistency clause it might have been held, as Judge Holmes suggested (179 F. 2d 547) that "when a railroad files a petition for reorganization under said Sec. 77, it voluntarily submits all of its assets and liabilities to the jurisdiction of the bankruptcy court". The presence of the consistency clause destroys that theory, if, as seems clear, the filing of a petition for reorganization under Section 77 was made under a statute which expressly denied to the Commission power to certify a plan which called for a merger without the consent of the carriers.

We have looked in vain in the brief in opposition to certiorari for any rational argument that the Acts

of 1933 and 1935 can be construed otherwise than as we contend. If the Interstate Commerce Act denies to the Commission power to force a merger without the consent of the carriers involved, that denial was certainly a "provision" or "purpose" of the Interstate Commerce Act. It is the very essence of Section 5.

The "cram-down" provision of the Act of 1935 related only to the power of the court, not the Commission. Before the "cram-down" provision comes into operation, it is necessary that the District Court have before it a plan such as the Commission had authority to certify, and a plan for forced merger without the consent of the carriers was not such a one. There are four steps in the process. The first is the approval by the Commission of a plan such as the Acts of Congress authorize the Commission to approve and certify to the court. The second is the submission of such Commission-approved plan to the court for the court's approval or disapproval. If the court approves the plan, the third step then consists of the submission of the plan by the Commission to the security-holders for their approval or disapproval. Then comes the fourth step, when the Commission certifies to the court the result of the vote of the security-holders and when the judge must confirm or refuse to confirm the plan. It is not until this fourth step in the process that the cram-down provision comes into operation, the judge at this stage, and not until this stage, having the right to confirm the plan even though it has not been approved by two-thirds of each class of affected security-holders. And the legislative history hereinafter disclosed confirms the view that the cram-down power of the court

was designed only to prevent disruption of a plan, otherwise valid and acceptable, by part or all of a class of security holders seeking to blackmail their way into a preferred position.

It seems to have been conceded by all parties that Section 77, as enacted in 1933, withheld from the Commission authority to certify a plan for merger, not consented to by the carriers. The provisions of the 1933 Act having that effect were preserved in the 1935 legislation. If the consistency clause in 1933 had that effect, how can the same provisions incorporated in the 1935 amendments have a different meaning? Consolidating the two consistency clauses of 1933 and transferring the consolidated clause to subdivision (f) of the 1935 edition certainly made no change in the law. There is no explanation in the legislative history as to why the transposition was made. All that can be said is that the legislative draftsman thought subdivision (f) was an appropriate place for it, and why was he not right?

The Interstate Commerce Commission said (Vol. 267, I. C. C. Reports, page 732):

> "There is nothing of record to show that the merger of the Florida East Coast with the Atlantic Coast Line is objected to by either. The stockholders of the Florida East Coast have not objected. The objection comes from certain of its bondholders."

This conclusion is fallacious for two reasons.

The first is that the Commission erroneously concluded that a merger could be ordered by the Com-

mission unless the Florida East Coast objected. The correct point of view is that the Commission could only order a merger if and when the carriers initiate it and consent thereto. That was the essence of the pertinent provisions of the Interstate Commerce Act (pp. 5-6, *supra*). Certainly no one representing the Florida East Coast Railway has consented.

The second reason is that the stockholders of the Florida East Coast are in no position either to consent or object on behalf of the company. The Commission has found that the stock is worthless and the stockholders no longer have any interest in the property, and the 5% bondholders are the equitable owners of the property. The Commission's conclusion that the bondholders are the equitable owners of the property, taking the place formerly held by its stockholders, is supported by the decisions of this Court. See *Helvering* v. *Cement Investors*, 316 U. S. 527; *Helvering* v. *Alabama Asphaltic Limestone Co.*, 315 U. S. 179, 183-4. To say the least, it is inadmissible that the stockholders would be heard either to consent or to object to a merger, or to represent the corporation, on that subject. Of this Judge Sibley said:

> "But the Commission argues that this debtor has also consented, because its stockholders have not appeared to object. I think that does not follow. It is expressly found that the debtor's insolvency is such that the stockholders are not interested parties. The debtor, its property and affairs now belong in equity to the creditors, and more specifically to the refunding bondholders. The full jurisdiction and control over them is in this court. The refunding bondholders by an overwhelming majority do not consent. If the court has the

power as a court of bankruptcy to consent for them, under the circumstances of this case it should refuse to do so" (81 F. Supp. 932).

The Atlantic Coast Line in its brief in opposition to certiorari attempted to base its opposition on what it calls the "public interest aspects" and the "private interest aspects" of the pertinent statutes (Brief in Opposition, p. 28). We confess we cannot follow the argument. If it is that the provisions of the Interstate Commerce Act preserved by the consistency clause permit the Commission to bring about a merger without the consent of the carriers if the Commission thinks the merger is in the public interest, our answer is that the statute contains nothing to that effect, and there is absolutely nothing in the statute or in the legislative history to support such an interpretation. The denial to the Commission of power to bring about mergers without consent of the carriers is absolute and unconditional.

II.

The legislative history of the statutes confirms the construction we advance.

Without regard to any legislative history, the plain meaning of Section 77, as enacted in 1933 and as amended in 1935, is that the long standing provision of the Interstate Commerce Act, withholding from the Commission power to bring about a merger without the consent of the carriers involved, was to remain in effect. The legislative history makes any argument to the contrary frivolous.

The so-called "consistency clause" in the Act of 1933 originated with Mr. Joseph B. Eastman, Chairman of the Legislative Committee of the Interstate Commerce Commission. Senator Hastings had written the Chairman of the Commission on December 20, 1932, sending him a proposed amendment to the bankruptcy law which would enlarge it to include railways, which was referred to Mr. Eastman.* On January 31, 1933, Mr. Eastman wrote Senator Hastings a letter, to which he appended suggested amendments, one of which was as follows:

> "Clause (3) subdivision (b), page 26:
>
> "(3) shall provide adequate means for the execution of the plan, which may, *so far as may be consistent with the provisions of sections 1 and 5 of the Interstate Commerce Act, as amended,* include the transfer of all or any part of the property of the debtor to another *railroad* corporation or to other *railroad* corporations or the consolidation of the properties of the debtor with those of another railroad corporation, or the merger of the debtor with any other railroad corporation, and the issuance, *so far as may be consistent with the provisions of section 20a of the Interstate Commerce Act, as amended,* of securities of either the debtor or any such *railroad* corporation or corporations, for cash, or in exchange for existing securities, or in satisfaction of claims or rights, or for other appropriate purposes;
>
> "*Explanation.*—This act ought not to authorize

* This correspondence is available in a much later public document, Railroad Reorganization—Hearings before the Special Subcommittee on Bankruptcy and Reorganization of the Committee on the Judiciary, House of Representatives—Seventy-sixth Congress, First Session, on S. 1869, Serial No. 11, Part I (1939), see pages 144, *et seq.*

railroad mergers or consolidations or the transfer of railroad properties or the issuance of railroad securities which are inconsistent with the applicable provisions of the Interstate Commerce Act, particularly the consolidation plan provisions. These amendments are intended to avoid that possibility."

Eastman's suggestion was adopted. His proposal was for the very purpose of providing that mergers in reorganizations in bankrupteies had to be made pursuant to the provisions of the Interstate Commerce Act which required initiation by and consent of the carriers.

So when the 1933 bill was pending in the House, Representative Horr was concerned lest the consolidation provision of Clause 3 of subdivision (b) of the bill might give the Commission power to compel consolidations and he had the following interchange with Mr. Hatton Sumners, in charge of the bill:

"Mr. Horr: May I inquire whether or not, where the word 'reorganization' is used, the gentleman is of the opinion that this would encourage consolidation of railroads?

Mr. Sumners of Texas: They could not be consolidated in violation of the interstate commerce act.

Mr. Horr: They would first have to go through that?

Mr. Sumners of Texas: They would first have to go through that."*

After a number of other Congressmen had expressed

* Congressional Record, Vol. 76, p. 2909 (1933).

the fear that the legislation would increase the Commission's consolidation power, Congressman Rayburn took the floor to allay that fear. He was Chairman of the Committee on Interstate and Foreign Commerce charged with responsibility for the Interstate Commerce Act. He said:

> "Fear has been expressed that with the enactment of this bill the powers of the Interstate Commerce Commission and the courts over consolidations and mergers would be expanded. It is my firm conviction that this proposal in specific provisions safeguards the present consolidation and merger provisions of the interstate commerce act and gives no additional authority to the Commission or the courts in these matters."*

The intention of Congress, in passing the Act of 1933, not to extend or enlarge the Interstate Commerce Act powers of the Commission over mergers and consolidations, and not to give it any compulsory power, could not have been made more clear. That was the very purpose of writing in the "consistency clause" and the very reason for which Mr. Eastman suggested to Senator Hastings that it be written in.

The Congress has always stood firmly against giving the Commission authority to bring about mergers without the consent of the carriers involved. The present provisions of the Interstate Commerce Act on this subject were in the legislation of 1920, and as above shown the Congress in 1933 and 1935 plainly refused to alter the law in this respect.

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* Congressional Record, Vol. 76, pp. 2917-2918 (1933).

Under date of January 21, 1935, Mr. Eastman, as Federal Coordinator of Transportation, issued a report (House Document 89, 74th Congress, First Session) on railroad problems. On page 42 he discusses the question of unification and merger of railroads. That discussion shows that at that time, January 1935, Mr. Eastman thought that there was no Act of Congress which enabled the Interstate Commerce Commission to order compulsory mergers, without the consent of the carriers. He discussed changes in the law to make such mergers possible, and wound up thus:

> "Under present financial conditions, however, it seems unlikely that there will be immediate need for these changes in the statutory provisions relating to consolidations or other unifications of carriers, and for that reason, and in view of the extent and complexity of the other transportation legislation which is herein recommended, *these changes will not now be recommended.*" (Italics supplied.)

This report is significant on two points. One, it recognizes that the existing (1933) statutes did not authorize forced mergers; and, two, that "these changes (statutory) to allow it will not now be recommended" (p. 43).

His recommendations were numerous (p. 105) but did not include any proposal to give the Interstate Commerce Commission power to compel mergers, without consent of the carriers.

At the Committee hearings on the bill for the 1935

amendments, Mr. Leslie Craven was a witness. Of him Mr. Eastman, the Federal Coordinator, said:

> "I shall not speak at length this morning, gentlemen, because I want most of the talking to be done by my counsel, Mr. Leslie Craven, who has made an intensive study of this matter and is much better equipped to deal with the details than I am."*

Mr. Craven said:

> "There is another provision with reference to the jurisdiction of the Commission as to sales and consolidations. I do not know that I can lay my finger on it this minute, *but it has the same provision which was in the previous act. We have not disturbed it.*
>
> The Chairman: It does not modify this power, does it?
>
> Mr. Craven: No, sir.
>
> The Chairman: Anyhow, it is in the law, and you say that it is in this bill?
>
> Mr. Craven: Yes. The jurisdiction of the Commission with reference to the issuance of securities, or with reference to sales, consolidations or mergers of debtors' property, is in lines 1 to 8 on page 26."**

He was referring to the "consistency clause" which in the Committee print of April 12, 1935, read "not inconsistent with the provisions and purposes of the Interstate Commerce Act as amended". That language was cha ged in the final enactment to read "not

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* Hearings, H. R. 6249, 74th Congress, 1st Session (1935), p. 13.

** Hearings, H. R. 6249, 74th Congress, 1st Session (1935), p. 59.

inconsistent with the provisions and purposes of Chapter 1 of Title 49 as on August 27, 1935, or thereafter amended" (Footnote, 11 U. S. C. A., 205f, p. 190).

We cannot find a word in the Congressional Record to suggest that the Congress intended by mere transposition of the "consistency clause" from subdivisions (b) and (e) to subdivision (f), or otherwise, to alter the 1933 Act, by giving the Commission power to force mergers. On the contrary, Congress was told repeatedly that giving such a power was not recommended and was not effected by the 1935 bill.

Neither in the Interstate Commerce Commission proceedings nor in the opinion of Judge Hutcheson in the Court of Appeals is there any rational argument to explain how the mere transposition of the "consistency" clause from subdivisions (b) and (e) to subdivision (f) altered the meaning of that clause. *Whatever it meant in subdivisions (b) and (e), it means in subdivision (f).* Why it was transposed is not explained in the Congressional Record. It seems to have been merely the view of the draftsman of the bill in its final form that subdivision (f) was a more appropriate place for it.

In the opinions of Judges who have considered this case, there is mentioned as a substantial constitutional point the question whether forcing the equitable owners of the Florida East Coast to part with that property and accept securities of another railroad company in payment, instead of money, violates the Constitution. State statutes providing for a fundamental change in the capital structure or in the nature of the business of corporations generally provide that

dissenting stockholders be paid off in money the appraised value of their shares. It does not appear necessary to press this constitutional point. This Court has often said that if a case is susceptible of the two solutions, one of which raises a constitutional question and the other does not, the Court will adopt the view which avoids the constitutional question. *Crowell* v. *Benson*, 285 U. S. 22, 62; *United States* v. *Rumely*, 345 U. S. 41, decided March 9, 1953, by this Court.

III.

The cram-down provisions of the 1935 Act were not intended to abrogate the requirement of consent of the carriers to mergers.

The so-called "cram-down" provisions of Section 77 were added as one of the 1935 amendments. They were as follows:

> "That, if the plan has not been so accepted by the creditors and stockholders, the judge may nevertheless confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e); * * *." 11 U. S. C. 205(e).

The 1933 Act had provided that a plan could not be approved by the court, unless accepted by two-thirds of each class of creditors.

As we pointed out above, the "cram-down" provision relates to the functions of the court and not the Commission, and before it becomes operative there must be a plan before the District Court, certified to it by the Commission, *which complies with the requirements of the law.*

Judge Sibley, after holding that Congress had not intended to force a merger undesired by the majority in amount of the affected parties "by permitting a merger to be part of a plan", said of the plan then pending which provided for a merger with the Atlantic Coast Line:

> "This conclusion makes it unnecessary to determine whether the court's power in bankruptcy could be extended to force a merger consistently with the Fifth Amendment. *It also ends this plan*" (81 F. Supp. 932). (Italics supplied.)

In 1939, *four years* after the 1935 amendments were enacted, when bills to amend the Interstate Commerce Act were under consideration, Chairman Wheeler of the Senate Committee on Interstate Commerce, said:

> "I have repeatedly said that you could not get a bill to force consolidations, or to have in here a provision that the Commission should have an opportunity of carrying on investigations of the subject to try to force consolidations, and so forth. So, as far as this committee is concerned, with reference to this bill, you are just wasting

our time in talking about consolidations, because that subject is out the window."*

This incident shows beyond cavil that the Congress understood at that time that the Commission had not had its powers over mergers enlarged in 1935.

That the "cram-down" provisions have nothing to do with the situation in this case appears in the report of Mr. Eastman, Coordinator of Transportation, issued January 1935, where it was said (pp. 101-2):

> "* * * But a fair and equitable plan may be defeated if not approved by two-thirds. As the law is now drawn, it seems to be generally believed that the power lies in minorities to block any reorganization. While it is not thought desirable to dispense with the securing of consents from the creditors and shareholders, it is clear that there should be provisions whereby a court may, under some circumstances, make effective a fair and equitable plan over the dissent of minorities, under an arrangement insuring a full hearing to all of the parties concerned and an adjudication by the Commission and the court establishing the fairness of the plan. * * * The plan, if approved by the court, shall then be submitted to the interested creditors and shareholders. The consents of two-thirds of each class of creditors and stockholders shall bind the minorities in such classes. But, if the court shall find that the plan is fair and equitable, it may make it effective, even if not so approved.

* Hearings on S. 1310, S. 2016, S. 1869, and S. 2089, 76th Cong., 1st Sess., 1939, p. 395.

Arbitrary compulsion of plans over the dissents of the interested classes is not intended, *nor is it believed that the courts will override strong dissents by any large number of such classes, or by a single large class,* excepting where it is established that they have no interest in the property. Rather, the purpose is to prevent the obstruction of plans which are favored by the larger classes of creditors or shareholders, but which are obstructed by minorities in the smaller classes in the attempt to secure unduly preferential treatment." (Italics supplied.)*

Of the seven Circuit Judges who have passed on this case four, Judges Sibley, Russell, Strum and Borah disagree with the result arrived at, and three, Judges Hutcheson, Holmes and Rives take the other view.

We are justified in reiterating the statement made in the petition for certiorari that if the amendments of 1935 have the effect of giving the Interstate Commerce Commission power to force mergers by making a merger part of a plan for reorganization under Section 77 of the Bankruptcy Act, then the Congress was plainly hoodwinked.

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* Report of Federal Coordinator of Transportation, 1934. House Doc. 89, 74th Cong., 1st Sess. (1935), 101-2.

IV.

The dismissal of reorganization proceedings under Section 77 of the Bankruptcy Act was justified.

On the assumption the plan was to be rejected, Judge Strum ordered the proceedings for reorganization under Section 77 to be dismissed and the equity receivership and suit for foreclosure to be reinstated.

That course was authorized, indeed required by subdivision (g) (*supra*, pp. 7-8). It was recommended by Commissioners Mahaffie, Splawn and Lee (R. Vol. I, Fifth Supplemental Report, p. 191). This case has been in the courts for twenty-two years, of which twelve years, since January 25, 1941, have been devoted to fruitless efforts and litigation to develop a plan under Section 77 complying with law and satisfactory to the courts and the interested parties.

Three-fourths of the 5% bondholders (the equitable owners of the property) have made an agreement (R. Vol. I, pp. 28 to 39) for reorganization through foreclosure sale, and are prepared to go through with it. By that agreement all 5% bondholders, other than the St. Joe Paper Company, are given the option to receive first mortgage bonds or stock or both in the company organized to take over the property.

The St. Joe Paper Company has a right to receive only stock in exchange for its 5% bonds (R. Vol. I, p. 35) and a voting trust of the stock of the new company is to be established for five years, with three trustees, only one of which is to be named by the St. Joe Paper Company.

CONCLUSION.

The judgment of the Court of Appeals should be reversed, and the judgment of the District Court, including the dismissal of proceedings under Section 77, should be affirmed.

Respectfully submitted,

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